EVERSON v. BOARD OF EDUCATION: A PRODUCT OF THE JUDICIAL WILL

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Everson v. Board of Education[1] stands as a key decision in laying the foundation for judicial review of all governmental practices supportive of religion. The beginning of an impressive and influential body of case law, it nationalized the restrictions embodied in the establishment clause of the first amendment and opened up a new and comprehensive surveillance of state and local laws and practices dealing with religious matters. While it has touched various sensitive areas of national life, the interpretations flowing from this decision have had their most important and dramatic impact in the field of education. On the one hand, *Everson* prepared the groundwork for decisions invalidating Bible-reading and prayer practices in the public schools. On the other, it and succeeding decisions staked out general guidelines for determining the validity of governmental aid in support of church-related educational enterprise. For all practical purposes the establishment limitation it applied to the states has superseded the old public purpose doctrine based on the substantive right interpretation of the due process clause as the governing approach to these questions.

What is equally interesting is that *Everson* has had a significant influence on the interpretation of state constitutional provisions. Prior to *Everson* state courts were reluctant to give a relaxed interpretation to constitutional and statutory provisions forbidding public assistance to sectarian interests. In *Everson*, however, the Court read into the establishment clause provisions commonly found in state constitutions but gave them a fairly liberal construction. Development of the secular purpose and child-benefit doctrines which justify the use of public

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1. 330 U.S. 1 (1947).

funds to provide bus transportation and textbooks for parochial school children has led state courts to adopt a more liberal view in their interpretation of specific provisions in state constitutions.[2] This development affords a fascinating study of the continuity and movement of constitutional ideas.

It cannot be gainsaid that Justice Black's notable opinion has had an important and enduring effect on our constitutional law. But a critical second look at the opinion reveals that Justice Black took considerable leeway with the history and language of the establishment clause and that some of his more sweeping assertions have been subsequently either qualified or repudiated. An appreciation of the importance *Everson* has played in the area of church-state relations should not obscure, therefore, assertions made by Justice Black which the Court has disowned. After setting the problems discussed in *Everson* against a background of earlier developments, Justice Black's opinion will be analyzed in five respects: the application of the establishment clause to the states; the historical interpretation of the establishment clause; the meaning of "no-aid" to religion; the wall of separation between church and state; and the concept of neutrality.

EARLIER DEVELOPMENTS

The problem raised in *Everson* was a fairly familiar one: whether a local school board could use public funds to pay for the transportation of children attending parochial schools. Prior to *Everson* this issue had been resolved before a number of state courts on the basis of state constitutions and statutes. A familiar ground for attack was that use of public funds to transport children to private schools, including parochial schools, violated a provision commonly found in state constitutions limiting the use of public funds to public purposes. Perhaps most pertinent, however, were the provisions also often found in state constitutions prohibiting the appropriation of any funds in aid of sectarian education or of educational institutions under sectarian control.[3] On the whole, the attacks made on various arrangements for subsidizing the transportation of parochial school children had proved quite successful. A majority of courts had found that such payments were invalid under one or more of these state constitutional provisions.[4] In a leading decision, for example, the New York Court of Ap-

2. *See, e.g.*, Board of Educ. v. Allen, 20 N.Y.2d 109, 228 N.E.2d 60 (1967), *overruling* Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Advisory Opinion *re* Constitutionality of P.A. 1970, No. 100, 384 Mich. 82, 180 N.W.2d 265 (1970).

3. For the relevant texts of the several state constitutions, see C. ANTIEAU, P. CARROLL & T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS 173-239 (1965).

4. The cases are noted and discussed in *id.* at 31-36.

peals had held that bus transportation for parochial school children at public expense violated an explicit constitutional restriction that public funds could not be used directly or indirectly to aid an educational institution under sectarian control.[5] As a result of that decision, the New York constitution was amended to authorize such use of public funds.

The question had also arisen whether public funds could be used to provide free, secular textbooks to children in all schools including parochial schools. Only a few courts had passed on this question prior to *Everson*.[6] Two of them had held that such payments were valid notwithstanding the ban on aid to sectarian schools.[7] In this connection, the Louisiana supreme court in *Cochran v. Louisiana State Board of Education*[8] had developed the child benefit theory which was destined to assume major significance in subsequent interpretation of the establishment clause, albeit under another label.[9]

Cochran was affirmed by the United States Supreme Court.[10] The only federal issue raised before the Court was whether there was a taking of public funds for a private purpose in contravention of the due process clause. Earlier, the Court had recognized in a series of decisions that the taking of taxpayers' money for a private purpose is a deprivation of property without due process of law.[11] In *Cochran*, however, the Supreme Court concurred in the reasoning of the Louisiana supreme court that the money was spent for a public purpose since it was to aid all children in the state. There was thus no violation of due process. The notion that the establishment clause was applicable to the states via the fourteenth amendment remained for future development and played no part in the decision.

The *Everson* case presented state constitutional issues to the New Jersey courts: (1) whether spending for transportation of children

5. Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938).

6. *See* C. ANTIEAU, P. CARROLL & T. BURKE, *supra* note 2, at 29-31.

7. Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929); Cochran v. Louisiana State Bd. of Educ., 168 La. 1030, 123 So. 664 (1929); Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

8. 168 La. 1030, 123 So. 664 (1929).

9. *See* discussion on the valid secular purpose theory, text accompanying notes 53 & 54 *infra*. The child benefit theory

> asserts that certain kinds of aid may be extended to children attending religious schools, and that this is aid to the child rather than to the religious school which he attends. Here there is no attempt to deny the existence of aid, but only to show that it is going to a proper recipient.

Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 337 (1950).

10. 281 U.S. 370 (1930).

11. *See* Green v. Frazier, 253 U.S. 233 (1920); Jones v. City of Portland, 245 U.S. 217 (1917); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875). *Cochran* was decided when the fundamental rights interpretation of the due process clause of the fourteenth amendment was still very much alive.

to private schools, including parochial schools, was for a public or a private purpose, and (2) whether this spending violated a restriction against use of public funds in aid of churches.[12] The New Jersey Court of Errors and Appeals, reversing the decision of the lower court, upheld the validity of the expenditure.[13] In reaching this conclusion it used the same argument to reject both contentions. It said that under the compulsory education statutes parents were required to send their children to some school. Noting that some children were without regular means of transportation, the court reasoned that unless public transportation were provided for them, parental compliance with the compulsory education requirements would be practically impossible. The court thus found that the payment of transportation expenses was complementary to, and in aid of, the compulsory education statute. The use of public funds was for a public purpose and did not contravene the prohibition on spending in aid of churches.[14] While the majority opinion stated that the constitutionality of the payments was also challenged under the fourteenth amendment, it did not explicitly deal with any federal question. Presumably the court recognized none. Since the dissenting judge referred to the Supreme Court's decision in *Cochran*, however, perhaps this indicates that the public purpose argument had been raised under the due process clause of the fourteenth amendment.[15] Presumably the New Jersey Court of Errors and Appeals thought that its handling of the public purpose problem under the state constitution was an adequate answer to the parallel argument under the fourteenth amendment. At most the public purpose question raised under the due process clause had been dealt with in a marginal way, and the no-establishment argument which assumed major significance in the Supreme Court had not even been raised before the New Jersey courts.

THE *Everson* OPINION

Everson was decided by the Supreme Court in 1947. Justice Black, writing for the majority,[16] said that two questions were raised under the United States Constitution.[17] The first was whether there

12. The further argument was made that this expenditure violated the constitutional requirement that school funds held in trust should be used for public school purposes only.

13. Everson v. Board of Educ., 133 N.J.L. 350, 44 A.2d 333 (1945).

14. Justice Case dissented in an opinion joined by Justices Colie and Wells. His opinion was notable for its criticism of the "child-benefit" argument. He said there was no logical stopping point in applying this theory to "the potential costs of the many and varied items entering into modern education." *Id.* at 359, 44 A.2d at 339.

15. *Id.* at 359, 44 A.2d at 339 (Case, J., dissenting).

16. His opinion was joined by Chief Justice Vinson, Justices Douglas, Reed and Murphy.

17. Justice Black rather briefly dismissed the argument that the school board's res-

was a taking of taxpayers' money for a non-public purpose and hence a deprivation of property without due process of law in violation of the fourteenth amendment. Speaking to this question,[18] Justice Black said that providing safe transportation for children going to school under the requirement of the state's compulsory education law was an expenditure for a public purpose. On this point he was aided by the Court's prior decision in the *Cochran* case.

Having disposed rather rapidly of the due process public purpose argument, Justice Black then turned to the more important issue in his view, which was whether this expenditure violated the establishment clause of the first amendment. It must again be emphasized that the Supreme Court had not yet spoken on the question whether the establishment clause operated as a limitation on the state's spending power. But Justice Black had no doubt about it in *Everson.* He said simply that the question was whether the payments at issue violated the establishment clause of the first amendment as made applicable to the states by the fourteenth. In support of framing of the issue in this manner, Justice Black relied on *Murdock v. Pennsylvania*[19] decided in 1943, where Justice Douglas had categorically stated that the fourteenth amendment made the first amendment applicable to the states.[20] *Murdock* dealt with the free exercise clause and not the establishment clause, however. For the first time and in summary fashion, therefore, the Court applied the establishment clause to the states, thereby opening up a wholly new aspect of federal constitutional law. *Everson* then became the vehicle for the first extensive opinion on the meaning of this clause, which to that point had come before the court only in isolated cases dealing with actions by the federal government.[21]

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olution was discriminatory since it limited reimbursement for transportation to children attending public and Catholic parochial schools. Pointing out that the enabling statute authorized such reimbursement only for children attending public schools and non-profit private schools, he said that there was nothing in the record to show that there were children in the township attending other than public or Catholic schools and that this was not the appropriate case to consider whether the statute violated the equal protection clause by denying the reimbursement benefit for children attending for profit private schools. Justice Jackson made much of the discrimination argument in his dissent.

18. It is worth noting that Justice Black, who repeatedly repudiated the fundamental rights interpretation of the due process clause did recognize the argument here and dealt with it on the basis of the Court's prior decision in *Cochran.* For the initial and extended statement of his views on this question, see Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). *See also* Ferguson v. Skrupa, 372 U.S. 726 (1963).

19. 319 U.S. 105 (1943).

20. "The First Amendment, which the Fourteenth makes applicable to the states . . . ." *Id.* at 108.

21. *See* Reuben Quick Bear v. Leupp, 210 U.S. 50 (1908) (congressional appropriation of Indian trust funds to support sectarian schools on an Indian reservation); Bradfield v. Roberts, 175 U.S. 291 (1899) (congressional appropriation of public

Turning to the construction of the establishment clause, Justice Black said that its meaning was to be determined in the light of its purpose as illuminated by history. Recalling the history of persecution under state-established churches, he said the purpose of the establishment clause was to prevent ecclesiastical influence on the government in order to gain a favored position. Such influence by one church inevitably would result in intolerance for others, persecution and divisiveness. Justice Black looked to Virginia history to give meaning to the establishment clause. In particular, he relied on the contributions of Madison, who wrote the *Memorial and Remonstrance*[22] directed against proposed Virginia legislation that would have revived the exaction of a tithe in support of religious teachers of the taxpayers' choice, and of Jefferson who drafted the Virginia Bill of Religious Liberty.[23] Justice Black observed that the people in Virginia, as elsewhere, "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[24] Previous decisions of the Court, according to Justice Black, had recognized that the provisions of the first amendment, which Madison and Jefferson played leading roles in drafting, were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.[25] He further noted that the constitutions of a number of states contained provisions "designed to protect religious freedom and to separate religions and governments."[26] He then concluded this portion of the opinion with that well known and often repeated dictum which stated the proposition in the broadest possible way:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any

funds to a hospital operated under auspices of a religious society in the District of Columbia).

22. II WRITINGS OF JAMES MADISON, 183-91 (G. Hunt ed. 1901).

23. *Id.* *See also* COMMAGER, DOCUMENTS OF AMERICAN HISTORY 125 (1944); 12 HENING, STATUTES OF VIRGINIA 84 (1823), *cited in* Everson v. Board of Educ., 330 U.S. 1, 13 n.14 (1946).

24. 330 U.S. at 11.

25. The decisions referred to were Davis v. Beason, 133 U.S. 33 (1890); Reynolds v. United States, 98 U.S. 145 (1879); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872). *Davis* and *Beason* cases dealt with issues of religious liberty and *Watson*—a diversity case—rested on the common law. In none of these cases did the Court have occasion to elaborate upon the meaning of the establishment clause.

26. 330 U.S. at 14.

> religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' . . .[27]

Having laid a broad foundation for the interpretation of the establishment clause with his sweeping assertion that government could do nothing to aid any or all religions, and concluding with Jefferson's well known metaphor about the "wall of separation between church and State," Justice Black next examined the problem before the Court and concluded that the New Jersey measure did not violate the establishment clause. He said the provision for bus transportation was a safety measure designed to assure the safe transit of school children. It was not designed to aid churches. Justice Black made much of the point that New Jersey law required every parent to send his child to some school and that the transportation reimbursement was designed to assure that the child would be transported in a safe way, thereby helping the parent to discharge his obligation under the compulsory education law. He cited other instances of public benefits for children going to parochial schools which were legitimate public services extended to all citizens regardless of religion. There was no distinction, he maintained, between paying the cost of a policeman to see that children crossed streets safely when going to a parochial school and providing bus transportation in order to carry children to school safely.

That parochial schools could be benefited indirectly because it was easier for parents to send their children to parochial schools if the government furnished bus transportation did not trouble Justice Black. In his point of view, providing safe buses was not an aid to religion and not in support of religious instruction. He emphasized that the government contributed no money to the parochial schools and gave them no other direct support.[28] Thus while laying the foundation for a broad interpretation of the establishment clause, the Court upheld the use of public funds to transport children to parochial schools.

The Court divided closely. Justice Jackson wrote a dissenting opinion, joined by Justice Frankfurter, and Justice Rutledge wrote a very long dissenting opinion joined by Justices Frankfurter, Jackson

27. *Id.* at 15-16 (citation omitted).
28. *Id.* at 18.

and Burton. All the dissenting Justices accepted the idea that the establishment clause applied to the states, and all accepted the broad interpretation given by Justice Black. The gist of their dissent was that the public subsidy for transportation of pupils to parochial schools amounted to aid to these schools and to the churches which maintained them.

THE OPINION IN RETROSPECT

Applicability of the Establishment Clause to the States

Everson was important, first of all, because it squarely determined that the first amendment's establishment of religion limitation was applicable to the states. Never before had an issue of state law been resolved by reference to the establishment clause. This was understandable. *Everson* was decided in the same term as *Adamson v. California*[29] which affirmed the idea that the fourteenth amendment did not apply the entire Bill of Rights to the states and that the due process clause protected against state deprivation of so-called fundamental liberties. Under this approach, these fundamental liberties might or might not coincide with liberties expressly delineated in the Bill of Rights. To be sure, the Court in *Palko v. Connecticut*[30] had recognized that the privileges and immunities explicit in the first amendment were absorbed in the fourteenth amendment since they were "found to be implicit in the concept of ordered liberty"[31] and since it was believed that "neither liberty nor justice could exist if they were sacrificed."[32] But the Court in *Palko* was speaking of the freedoms of speech, press, religion and assembly. In *Cantwell v. Connecticut* the Court had said: "The fundamental concept of liberty embodied in [the Fourteenth] [A]mendment embraces the liberties guaranteed by the [F]irst [A]mendment."[33] It is quite clear, however, that Justice Roberts in *Cantwell* was speaking only of freedom of belief and freedom in the exercise of religion as fundamental. And while Justice Black in *Everson* referred to *Murdock* as determining that the first amendment applied to the states, that decision, as noted earlier, also rested on the theory of the free exercise of religion. In sum, the earlier Supreme Court cases dealing with the application of first amendment rights to the states had centered on personal freedom and liberties, including the free exercise of religion, but they had not considered the status of the establishment clause.

29. 332 U.S. 46 (1947).
30. 302 U.S. 319 (1937).
31. *Id.* at 325.
32. *Id.* at 326.
33. 310 U.S. 296, 303 (1940).

It is understandable, of course, that Justices Black and Douglas would speak of the application of the first amendment to the states since they had taken the position in *Adamson*, along with Justices Murphy and Rutledge, that the fourteenth amendment incorporated the entire Bill of Rights. Up to this point, however, this theory had not been accepted by a majority. At most it could be said, based on an uncritical acceptance of Justice Douglas' statement in *Murdock*, that the first amendment had been selectively incorporated into the fourteenth. But it may be doubted whether a majority of the Court at the time of *Everson* had accepted the notion of selective incorporation. What was extraordinary in the *Everson* case, then, was that all of the Court seemed to agree that the establishment clause applied to the states and that the only problem was interpreting that clause.

This is all the more surprising in view of the fact that Justice Frankfurter was on the Court. In his long concurring opinion in *Adamson* he had rejected the notion that the effect of the fourteenth amendment was to make the Bill of Rights apply to the states and in turn defended the fundamental rights theory.[34] Yet he said nothing in his special concurrence in *Everson* to explain how the application of the establishment clause coincided with his notion of the fourteenth amendment, or why there was a question of deprivation of property without due process of law. Likewise, since Justice Jackson at a later time could distinguish between restrictions placed on the states and the federal government respectively under the fourteenth and first amendments,[35] it is surprising that he, too, was swept along by the idea that the establishment clause was applicable to the states in its full force. This was a decision of major consequence and the fact that none of the Justices who had previously refused to apply the Bill of Rights to the states wrote even a brief opinion relating the establishment limitation to the fundamental rights interpretation was noteworthy and puzzling. The only satisfactory explanation is that they impliedly accepted the proposition that the establishment clause embodies one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."[36] Justice Frankfurter corroborated this view in his concurring opinion in *McCollum v. Board of Education*.[37] Still later Justice Brennan said that the free-

34. 332 U.S. at 59.

35. *See* Beauharnais v. Illinois, 343 U.S. 250, 288 (1952) (Jackson, J., dissenting).

36. This language, taken from Hebert v. Louisiana, 272 U.S. 312, 316 (1926), was quoted by Justice Cardozo in his opinion in Palko v. Connecticut, 302 U.S. 319, 328 (1937).

37. 333 U.S. 203 (1948). He said that the separation of the religious and the secular in the field of education was a principle dominant in our national life at the time of the adoption of the fourteenth amendment. The basis of the separation prin-

dom from such governmental involvement in religious affairs as proscribed by the establishment clause was included in the panoply of new federal rights created in the fourteenth amendment for the protection of citizens of the several states; moreover, in his view the establishment clause was a co-guarantor with the free exercise clause of religious liberty.[38]

Viewed as a question of fundamental rights, it must be asked what is the fundamental right stated in the establishment clause which is proteced as a fundamental liberty under the fourteenth amendment against deprivation without due process? Is it simply a right to be free from establishment, or is it a right not to be deprived of life, liberty or property by a law respecting establishment of religion? In other words, when is the right to be free from establishment violated? Must there be the loss of a property interest or some coercion of personal liberty before it can be said that a person has suffered from a law respecting an establishment of religion? These questions suggest both matters of substance and of standing to raise the establishment issue. If the question is one of protecting a fundamental right under the due process clause, any person raising the matter will be required to show some personal injury to himself either by the taking of his property for a religious purpose or by coercion of his own conscience and belief. But if such injury need not be shown, then the use of the establishment clause marks a departure from a fundamental principle of constitutional litigation, namely, that private persons do not have standing as attorneys general to challenge assertions of power in violation of the Constitution and that everyone must show an invasion of some right or interest.

Whatever questions could have been raised about the *Everson* Court's application of the first amendment's establishment proscription to the states, in respect to the fundamental rights theory and the application of basic due process notions, it is clear that later decisions have built squarely on the *Everson* holding that the establishment clause applies to the states. In his opinion in the school prayer and Bible reading case,[39] Justice Clark maintained that the establishment limitation may be invoked as a separate limitation on government action without a showing that the challenged practice impairs a constitutionally protected liberty.[40] Thus the establishment clause is recognized as stating a fundamental limitation on government and

ciple as made binding upon the states through the adoption of the fourteenth amendment was "the whole experience of our people." *Id.* at 215.

38. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 255-56 (1963).

39. *Id*

40. *Id.* at 222-23.

resting on its own feet. It is true that the Court has not yet said that any citizen is free to invoke the establishment proscription, but standing presents no major problem.[41]

The impact of *Everson* on federal spending was delayed because of the persistence of the *Frothingham* doctrine[42] that federal taxpayers do not have standing to challenge the validity of such spending. Finally, however, in *Flast v. Cohen*[43] the Court held that a federal taxpayer did have standing to challenge a federal appropriation on the ground that it violated the establishment clause. This opened the gates for attacks on federal spending programs claimed to be supportive of religion.

Historical Interpretations of the Establishment Clause

Justice Black said that the language of the establishment limitation, in light of its purpose as illuminated by history, should be interpreted to include the provisions commonly found in state constitutions such as those prohibiting states from levying a tithe to support ministers or forbidding the use of public funds for churches or educational institutions under sectarian control. If the drafters of the first amendment intended to incorporate commonly found provisions in state constitutions, they chose a short way of doing so. The language of the establishment clause is ambivalent and indeterminate. Nothing in the historical research to date lends authority to Justice Black's broad interpretation.[44] Indeed, the clause could more naturally be interpreted in a far narrower way to refer to establishment in the usual sense or to preferential treatment of one or more religions.

The notion that nothing could be done to aid religion has little support in the text of the first amendment. Justice Black did not pretend in *Everson* to give the legislative history of its language. Studies indicate that it is not clear what was intended, at least not as clear as Justice Black assumed.[45] Moreover, there is also persuasive evidence that one purpose in the use of this language was to make clear that Congress was not to interfere with state religious establishments which

41. Objecting parents were recognized to have standing to raise the establishment clause argument in *Schempp*. See the reference to the standing problem in Justice Clark's opinion, *id.* at 224 n.9, and in Justice Brennan's opinion, *id.* at 266 n.30. The Court now recognizes that federal taxpayers have standing to challenge federal expenditures claimed to violate the establishment clause. Flast v. Cohen, 392 U.S. 83 (1968).

42. *See* Frothingham v. Mellon, 262 U.S. 447 (1923).

43. 492 U.S. 83 (1968).

44. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 123-42 (1964).

45. For an extended study of the legislative history of the establisment clause, see *id.* at 123-42.

were fairly common at that time.[46] It is, therefore, an equally tenable position that the establishment clause was intended to provide only that the powers respecting the establishment of religion were to be reserved to the states and not to the Congress. In view of this historical purpose it is ironical indeed that the *Everson* Court applied the establishment limitation to the states, and that nearly all of the significant cases subsequently arising under this limitation have involved state expenditures or programs of various kinds.

The question may be raised whether the language of the establishment clause should be read entirely on the basis of what Madison or Jefferson had in mind. It must be remembered that this was a constitutional amendment and that equal regard must be given not only to the views of others who participated in its drafting, but also to the understanding of the Congress which submitted the amendment to the states and to the understanding of the states which ratified it. There is no substantial evidence to indicate that the no-establishment phrasing was generally understood to convey a meaning that could be equated with the Virginia Bill of Religious Liberty or with Madison's views or with the interpretation placed on it in Everson.[47] Conceding Madison's part in drafting the language,[48] and whatever deference is thereby owed to his views, it is conceivable that the language chosen did not fully convey his own ideas on the matter.[49] It must be remembered that Madison entertained very strong views in the area of church-state relations. Only recently, Justice Brennan in an interesting footnote in the tax exemption case[50] pointed out that later in life Madison entertained what could be regarded as extreme views on the establishment clause. It is readily possible, therefore, that either Madison did not entertain these extreme views earlier when he helped draft the first amendment, or that the first amendment did not fully embody the restrictions he had in mind. As President, for instance, Madison vetoed a bill to incorporate a church in the District of Columbia since he thought this would constitute a forbidden establishment.[51] The whole later history of religious corporations has disowned this view. It

46. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting).

47. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 43, at 143-58; Frank, Religious Liberty in the Constitution, Church and State Under God, pp. 278-81 (A. Huegli ed. 1964).

48. Anson Phelp Stokes in his great work, CHURCH AND STATE IN THE UNITED STATES, 546-48 (1950), concludes from the study of the legislative history that there is no basis for assuming that the wording finally agreed on was the work of Madison anymore than of Charles Carroll or any of the others. *See also* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 43, at 131.

49. *See* Frank, *supra* note 47, at 278-81.

50. Walz v. Tax Comm'n, 397 U.S. 664, 684 (1970) (concurring).

51. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1902, at 489 (J. Richardson ed. 1907).

would be a mistake, therefore, to interpret the establishment clause wholly in terms of what Madison and Jefferson thought.

One further consideration should be mentioned at this point. Mark DeWolf Howe has pointed out that there were really two strains in American thinking that contributed to the idea of church-state relations.[52] One was the contribution made by Madison and Jefferson who, while very much concerned with religious liberty, were chiefly concerned that the state should not be governed by the church. They viewed the establishment clause as an insulator protecting the state from churches seeking favors and preference. But to place this emphasis on the contributions of Madison and Jefferson, as Howe pointed out, is to ignore a second strain of thought, the contribution made by Roger Williams of Rhode Island. Williams' thinking was directed to religious liberty which had its source in an inner spiritual freedom, a liberty which could not be sanctioned or nurtured by the state. Williams disowned state supported religion not because of a fear of ecclesiastical influence on the state, but for the opposite reason; namely, that state support would tend to degrade religion and destroy its essential vitality. His interest was in protecting the church and religion from the corrupting influence of the state. If religious freedom is the central consideration, then the free exercise and establishment clauses can be seen in a somewhat different perspective and their relationship to each other becomes more meaningful. As Howe suggests, whatever argument might be made from the Jefferson-Madisonian point of view, undoubtedly Roger Williams would not have regarded it as improper for the state to take measures which enlarge and advance the domain of religious liberty.

CONCEPTS IN *Everson*

No-Aid to Religion

One statement in *Everson* which is often cited is that neither the federal nor state governments can pass laws which "aid all religions . . . ."[53] This language is broad and sweeping and if literally construed would certainly have startling consequences. The state aids religion in many ways. Probably the most familiar is insuring public safety and order so that churches can function and people can exercise religious liberty. The state has a monopoly of political power and the ultimate authority with respect to maintaining the peace. Churches, like other groups, are the beneficiaries of the states' authority in this respect. The state could hardly refuse giving such aid even

52. *See* M. HOWE, THE GARDEN AND THE WILDERNESS 1-31 *passim* (1965).
53. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

if it wanted to. The state provides the usual services to churches: fire and police protection, water and electricity. It may make it a crime to steal church property or to create a public nuisance near a church. Churches may incorporate under state laws thus facilitating their business and programs. They may own property and thereby add greatly to their strength and influence. The courts of the state are open to religions to resolve disputes within the congregation where the control of property is involved. Indeed, the state may even aid religion by providing for religious exemptions from various laws, and it may aid by giving tax exemptions for property used for religious purposes. This list easily could be extended.

It is unclear what Justice Black meant when he used the term "aid." In the first place, it may be assumed in light of the context that he was speaking particularly of direct financial aid to religion and, secondly, that he was speaking of aid in distinctive support of religious purposes. These assumptions are evident by the holding of the case: a state may provide funds for bus transportation for children going to school, even if some are going to parochial schools. Obviously this was aid to the parents who sent their children to parochial schools on religious grounds, and it was certainly at least an indirect aid to the parochial schools themselves. Justice Black had to distinguish, therefore, between direct aid in distinctive support of religion and the indirect aid which might result from governmental programs aimed at legitimate public purposes. In any event, the no-aid language is far too broad and sweeping to be very helpful in interpreting the first amendment, and it is clear that later opinions have disowned such a wide construction. Indeed, Chief Justice Burger has recently noted that one of the problems has been that the Court in earlier opinions spoke with "too sweeping utterances."[54] Undoubtedly he had in mind what Justice Black said in his far-reaching dictum in *Everson*.

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54. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). The Chief Justice also stated that "[t]he hazards of placing too much weight on a few words or phrases of the Court is abundantly illustrated within the pages of the Court's opinion in Everson." *Id.* at 670.

Despite the no-aid language, the *Everson* Court developed the very important and enduring idea that the government, in pursuing secular purposes, may properly afford aid to religious institutions so long as the aid to religion and the institution is simply incidental to the achievement of a secular purpose. See Tilton v. Richardson, 403 U.S. 672 (1971) (capital grants to church-related colleges); Board of Educ. v. Allen, 392 U.S. 236 (1968) (free loan of secular textbooks for children in parochial schools); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws). *See also* Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, Di-Censo, and Tilton Cases*, 13 ARIZ. L. REV. 1 (1971). The secular purpose doctrine was given formal expression and made a definitive test by Justice Clark in School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963), when he said the inquiry must be whether the program has a valid secular purpose and a primary effect that neither advances nor inhibits religion.

Separation of Church and State

Another expression from the *Everson* opinion which is widely quoted and indeed the starting point for some people in their thinking on church-state relations is Justice Black's quotation of the passage from Thomas Jefferson's letter to the Danbury Baptists. In that letter, Jefferson said the purpose of the first amendment was to create a wall of separation between church and state. It is again evident that just as the no-aid language used in *Everson* proved too wide and sweeping to be meaningful, so the invocation of the wall of separation metaphor has not been very helpful. At most it may suggest that the churches and the government have separate functions to perform, but if it goes beyond this to suggest that the functions of the two can adequately be maintained on separate sides of the wall and that one cannot affect the other, it lacks meaning and value as a guide to constitutional interpretation. The use of any metaphor as a substitute for reasoning and principle is suspect, and this was early found to be the case with respect to the wall. Many functions are performed both by the state and religious groups, such as providing schools, hospitals and other eleemosynary institutions. Moreover, the state has a role in preserving the conditions of religious liberty, and the church should provide a spiritual milieu and a moral climate for the secular state. The wall metaphor may be helpful to indicate that church and state are to avoid relations which result in what the Court later described as "excessive entanglements."[55] The term "separation of church and state" is relevant only in the context of problems involving the distinctive relationship between state and religious organizations, such as those arising from the granting of tax exemptions and subsidies to churches or church-related institutions and from the intervention of civil courts in the internal affairs of ecclesiastical bodies. Separation of church and state should not be equated, however, with separation of religion and government. The latter idea is far broader and only a few of the cases that have arisen under the establishment clause have really dealt directly with the separation of church and state. Thus the questions whether the government by its laws may sanction or protect religious belief, incorporate religious exercises in its public educational programs, or erect religious symbols on public property, while raising establishment questions, cannot accurately be characterized as church-state problems.

Apart from the limited usefulness of a metaphor in dealing with the problems under consideration, the Court's adoption of Jefferson's

55. This term was first used by Chief Justice Burger in his opinion in Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

statement about the establishment of a wall suggests that separation of church and state is the ultimate principle in the first amendment. This view is subject to the criticism so aptly made by Professor Katz that religious freedom is the ultimate value captured in the twin religion clause and that separation is a supplemental principle which is useful in so far as it serves to protect and advance religious freedom.[56] Indeed, Justice Douglas, a foremost exponent of the no-aid interpretation of the establishment clause at least in regard to use of public funds, said in a later opinion[57] that it is not the purpose of the first amendment to establish a complete separation of church and state; rather, it is to studiously define the manner and the specific ways in which they are to be kept separate by prohibiting an establishment of religion and by prohibiting laws that prohibit the free exercise of religion. In short, insofar as there is separation under the first amendment it is as a result of the interaction between the twin clauses and is not a central principle to guide in their interpretation.

The subsequent history of *Everson's* wall of separation language is illuminating. Justice Frankfurter in his separate opinion in *McCollum* spoke about a fence, and said that "good fences make good neighbors."[58] More recently Chief Justice Burger has said that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[59] At least this "line" suggests something less formidable and complete than a wall, and even a fence is far more open than a wall.[60]

Neutrality

Another idea which was expressed though not fully developed in *Everson* but which has been widely recognized in later cases is the idea of neutrality. Justice Black said that the first amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers . . . ."[61] Neutrality is a very important idea and it could be elevated to a central principle which undergirds and unifies the establishment and free exercise clauses. Justice Black was speaking of neutrality in the sense that the government was prohibited from

56. Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 428 (1953).
57. Zorach v. Clauson, 343 U.S. 306, 312 (1952) (concurring).
58. 333 U.S. 203, 232 (1948) (Frankfurter, J., concurring).
59. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
60. Perhaps Robert Hutchins has made the most complete attack on the wall metaphor and has exposed its uselessness in dealing with constitutional problems. See Hutchins, *The Future of the Wall*, in THE WALL BETWEEN CHURCH AND STATE 17-25 (D. Oaks ed. 1963). *See also* Stanmeyer, *Free Exercise and the Wall: The Obsolescence of a Metaphor*, 37 GEO. WASH. L. REV. 223 (1968).
61. 330 U.S. at 18.

either favoring religion or discriminating against it. At this point he was apparently drawing on both religion clauses to support the concept. So construed, it could be said that Justice Black's neutrality anticipated what Professor Kurland said about these clauses; namely, that they embody a principle of equal protection in the sense that religion is not to be used as a basis for classification which results in either advancement or inhibition of religion.[62] The implications of that idea are, of course, enormous. Neutrality so conceived contradicts the no-aid principle insofar as the latter requires the state to discriminate against religious institutions in dispensing funds for public purposes. This strict neutrality is easily illustrated and applied. If a state supports only public schools, it is completely neutral respecting the religion factor in that it treats all religions the same. Likewise, if a state provides money for all schools in the state including parochial schools it is completely neutral. Viewed in the opposite way, and in concurrence with Kurland's thesis, if a state supports all schools except parochial schools, it is not neutral because it discriminates on the basis of religion. So conceived, the neutrality idea would require the invalidation of state constitutional provisions which require discrimination against parochial schools in the dispensation of public funds for educational purposes. It seems clear that Justice Black would not have extended the neutrality idea so far as to permit, much less require, a state to support sectarian schools, in view of his statement that government may not be used to support institutions which teach religion. Justice Black's reference to neutrality must be viewed in the context of his total opinion, and particularly with reference to the result reached in the case. In the *Schempp* opinion Justice Clark made much of neutrality as a central theme of the first amendment and other Justices in separate opinions expressed their strong support of the principle.[63] It is difficult to define neutrality, however, and while one may begin with Justice Black's simple statement in *Everson*, it is clear that neutrality means different things to different people. To some, such as Professor Kurland, it may mean that there can be no classification that takes religion into account. Professor Katz in his illuminating writings on the subject also states that the first amendment requires neutrality, but he says that in some cases adherence to the free exercise clause permits the state to use so-called neutralizing aids and that these do not violate the establishment clause.[64] This is a departure from strict neutrality.

62. P. KURLAND, RELIGION AND THE LAW *passim* (1962).
63. *See* Kauper, *Schempp and Sherbert, Studies in Neutrality and Accommodation*, 1963 RELIGION AND THE PUBLIC ORDER 3, 10-23.
64. *See* Katz, *Radiations from Church Tax Exemption*, 1970 SUPREME COURT REVIEW 93, 101-04.

The point made by Professor Katz raises the question of the relationship between the establishment and free exercise clauses. Justice Black anticipated this in his *Everson* opinion when he said that government should be careful not to burden the free exercise of religion. Indeed, the Court in later cases has held that the state in some situations may be required to grant an exemption on religious grounds from a law of general application in order to avoid interfering with the free exercise of religion.[65] Moreover, the Court has said that a state may choose to accommodate public services to the spiritual needs of its people,[66] and also that in observance of a "benevolent neutrality" it may grant a property tax exemption on religious grounds even though not required by the Constitution.[67] Obviously the result is to aid religion, and it is a result that can hardly be reconciled with a concept of strict neutrality. Justice Black in *Everson* laid the foundation for the expanded use of the neutrality concept and anticipated the possible conflict between the establishment and free exercise limitations in some situations.[68] Later decisions have pointed up the difficulties in trying to reconcile these competing considerations.

THE IMPACT OF *Everson*

Everson abounded in ideas for interpreting the first amendment and most of the thinking in the later cases can be regarded as a variation on themes introduced in Justice Black's opinion. Some of the ideas basic to *Everson* are now solidly accepted: that the establishment clause applies to the states; that it should be given a broad construction going beyond the idea that government should not establish a church, sanction particular beliefs, or impose religion on people. But it is also clear that some of the ideas expressed and language used in *Everson* have been repudiated. The Court has disowned the broad no-aid language which, taken by itself, represented an extreme interpretation of the establishment clause. The wall metaphor has fallen into disuse and the notion that the first amendment embodies a general and ultimate principle of separation of church and state has been qualified by later decisions. Two other principal ideas have survived although they do not always point toward the same conclusions. The first is the secular purpose doctrine which proved to be very useful in jus-

65. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

66. Zorach v. Clauson, 343 U.S. 306, 314 (1952) (public schools can release students during school hours to religious centers for religious instruction).

67. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

68. *But see* Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971). *See also* Kauper, *supra* note 53, at 582-83 (commenting on the possible decline of the neutrality principle in the wake of *Lemon* and *Tilton*).

tifying state assistance to church-related institutions which perform secular functions even though there is incidental aid to religion. This continues perhaps to be one of the most frequently invoked ideas in church-state litigation. The second is the idea expressed in an embryonic way by Justice Black that government must be neutral in its treatment of believers and unbelievers. While neutrality has assumed a major significance in many later opinions, it has come to mean different things to different Justices. Like no-aid and secular purpose, neutrality should state a starting point in thinking and not a rule. Finally, Justice Black even anticipated the question of reconciling the establishment and free exercise limitations, and the problem of giving establishment such a wide construction as to defeat the free exercise guarantee.

One distinctively new idea has been added by the later cases. Beginning with *Walz v. Tax Commission*[69] the Court has developed the concept that governmental programs otherwise valid in the support given to religious institutions may nonetheless violate the establishment limitation because they lead to "excessive entanglements" between civil and religious authorities.[70] But the idea behind this terminology was implicit in the separation doctrine stressed in the *Everson* opinion. Indeed, in a broad sense the "excessive entanglements" doctrine, developed as a limitation independent of the secular purpose and neutrality concepts, makes clear that the basic ideas underlying *Everson* have not lost their vitality.

While Justice Black took considerable liberty with both the history and the language of the first amendment, it seems clear that in terms of the end result the case was consistent with the general trend of nationalization of the Bill of Rights and that it found support in ideas and limitations commonly expressed in state constitutions. Viewed pragmatically, the case laid the foundation for an accommodation of constitutional interpretation to American religious pluralism at a time when the nature of this pluralism and its implications for American life were becoming more apparent. It opened the way for a re-examination of historically sanctioned practices. The problems presented to the Court in the wake of *Everson* have not on the whole proved easy of resolution. They touch on delicate and sensitive areas of national life. By their very nature they are difficult problems, and any decision is likely to offend one or more groups. No test or standard provides a ready index to the solution of these questions.

69. 397 U.S. 664 (1970).
70. For the use of this idea to invalidate state programs to pay for the teaching of secular subjects in public schools, see Lemon v. Kurtzman, 403 U.S. 602 (1971).

The basic problem of reconciling the demands of free exercise and the limitations of the establishment clause has been and will continue to be a challenge to the Court's best thinking. *Everson* and succeeding decisions which are built on it have provided the Court with a number of general principles for approaching these questions. Simply by opening up this area for adjudication on a national basis, *Everson* established itself as a milestone decision.